

U.S. Department of Labor

Office of Administrative Law Judges
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Mailed 1/2/01

In the Matter of:

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Adeline Torain Cotton
Claimant

* BRB No.: 92-2333

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* Case No.: 1985-LHC-515

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against

* OWCP No.: 5-16984

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Newport News Shipbuilding
Employer/Self-Insurer

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APPEARANCES:

Pro Se

For the Claimant

Lawrence P. Postol, Esq.

For the Employer/Self-Insurer

BEFORE: **DAVID W. DI NARDI**

Administrative Law Judge

DECISION AND ORDER ON REMAND - DENYING BENEFITS

This is a claim for compensation benefits for temporary total disability and permanent total disability under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq. (1976) ("the Act"). Hearings were held on August 14, 1985 and April 29, 1986 in Baltimore, Maryland before Judge Peter McC. Giesey. Judge McC. Giesey issued a Decision and Order dated August 24, 1987, which the Benefits Review Board vacated and remanded by its Decision and Order dated April 30, 1990. Judge McC. Giesey issued a second Decision and Order dated June 22, 1992. By Decision and Order dated November 29, 1995, the Benefits Review Board specifically affirmed Judge McC. Giesey's finding that the Claimant is not disabled as of 1982. However, the Board, noting that the Judge relied on Dr. Filtzer's opinion, which is dated March 20, 1982, remanded the case for consideration of any disability before 1982, and for consideration of certain medical bills which were claimed as

unpaid. Judge McC. Giesey has passed away, and this case has been assigned to the undersigned. I have reviewed the records and I do not find that I need to hear any new testimony so as to resolve the issues herein. Because the Benefits Review Board upheld Judge McC. Giesey's decision as to a lack of disability after Dr. Filtzer's March 20, 1982 opinion, I will generally not address the evidence relating to the time period thereafter, although I have reviewed all the evidence in the record.

The Findings of Fact and Conclusions of Law made by distinguished and late colleague Judge Peter McC. Giesey, to the extent not disturbed by the Board, are binding upon the parties as the "Law of the Case," are incorporated herein by reference as if stated **in extenso** and will be reiterated herein as needed for purposes of clarity and to deal with the Board's mandate to the Office of Administrative Law Judges.

Summary of the Evidence

The Claimant began working at Newport News Shipbuilding and Dry Dock Company (hereinafter "the Shipyard" or "the Employer") on May 5, 1977 in the fitters' department X-11 (EX 3B).¹ She sustained an injury on July 27, 1977 when, as she was trying to put up a piece of steel, it slipped from her grip and fell on her chest and arm (Tr. at 35:8-38:22; EX 2 at 2). An examination of the Claimant at the Shipyard clinic revealed a contusion, but no break in the skin (EX 3F; EX 4; EX 56).

The Claimant was seen at the Shipyard clinic on July 28, 1977 and mild tenderness of the upper sternocostal joint on the left was noted and was treated with hot packs and analgesics (EX 3F at 5; EX 66 at 10:11-19). A chest x-ray taken on July 28, 1977 was read as negative by Dr. Padayhag, a Shipyard physician (EX 66 at 42:4-7). The Claimant was seen at the Shipyard clinic again on August 1, 1977 with a tender right forearm and hand and an asymptomatic chest (EX 3F at 6; EX 66 at 11:15-23). A right forearm and hand x-ray taken on August 1, 1977 was read as negative by Dr. Padayhag (EX 66 at 41:25-42:3). A chest x-ray taken on October 24, 1977 was read as negative by Dr. Harmon, the Shipyard's medical director (EX 66 at 42:8-11). The Shipyard scheduled two appointments for the Claimant to be examined on November 21, 1977 and November 28, 1977 by Dr. Winfrey, a board-certified thoracic surgeon, but the Claimant

¹The following abbreviations are used herein:

- "CX" - Claimant's Exhibit
- "EX" - Employer's Exhibit
- "Tr." - Transcript of the hearing on April 29, 1986 in Baltimore, Maryland.

failed to keep either appointment (Tr. at 63:15-64:9; EX 3C; EX 7; EX 66 at 17:3-15).

The Claimant selected Dr. Harrison, a family practitioner in Franklin, as her treating physician, and continued to see him until September 29, 1977, when he released her to return to work (EX 3F at 6, 11; EX 66 at 12:1-13:21; 15:19-22). The Claimant saw Dr. Harrison again on October 22, October 29, November 22, and December 29, 1977, at which time he again released her to return to work as of January 2, 1978 (EX 21).

On January 2, 1978, the Shipyard completed a form NN 3370 returning the Claimant to work with the restrictions recommended by Dr. Harrison of no climbing, lifting, or straining (EX 3F at 16; EX 66 at 21:13-22:8). The Claimant worked for three days, but did not return to work on January 5, 1978. She was seen at Obici Hospital, was diagnosed with costochondritis, and was told to return to work (EX 66 at 22:22-23:4). The Employer, given the prior negative examinations and the Claimant's failure to keep her appointments with Dr. Winfrey, did not authorize the time out (EX 66 at 22:22-23:24). The Claimant then worked from January 9 to 13, 1978 (EX 3B at 5). The Claimant did not return to work thereafter.

On January 19, 1978, the Shipyard offered the Claimant light work, working on a flat surface picking up washers weighing less than one pound, but the Claimant refused the offer. The Claimant was instructed to return to the clinic on February 1, 1978, but she did not return (EX 66 at 23:24-24:18; **See also** EX 3F at 9).

The Claimant's testimony was vague in her refusal to perform the light duty work she was offered. The weight of the evidence shows that the Claimant improperly refused to work appropriate light duty work (EX 62 at 17:17-24:10; 26:7-27:1; 35:20-36:20). The Shipyard presented testimony of the Claimant's foremen, general foreman, and the present supervisor of personnel for her department, regarding the Claimant's unreasonable refusal to work a job within her doctor's restrictions.

After the Claimant was returned to work by her physician, she was assigned light duty grinding work under foreman Horace Whitley. Mr. Whitley explained that the grinder weighed only 1 ½ lbs., yet the Claimant never even really tried to perform the work (EX 72 at 5:6-13). He testified that the Claimant did not appear interested in what she was doing and that, in his opinion, she did not make a good faith effort to do the job. Mr. Whitley further testified that he had supervised other injured workers on light duty, who did what they could to accomplish their job (EX 72 at 5:18-7:6; **See also** EX 69 at 15:4-16:2).

After the Claimant refused to work the light grinding job, the Shipyard offered the Claimant another extremely light duty job picking up washers, nuts, and bolts weighing six to eight ounces (EX 69 at 9:3-11:13). The Claimant was assigned to foreman Richard E. Cone, who testified that the Claimant made no real attempt to perform her job (EX 71 at 4:23-5:19). He testified that the Claimant walked up and down the final assembly platen and was not productive at all. Mr. Cone stated that, in his opinion, the Claimant did not make a good faith effort to perform the job compared with other light duty workers doing the same job (EX 71 at 6:10-21; 12:7-18).

After the Claimant declined to work the second job, she was referred to general foreman Leroy Mangrum. Mr. Mangrum confirmed with the Shipyard clinic that the work which the Claimant was assigned to perform was within her work restrictions. The Claimant became loud and argumentative as well as abusive, and called Mr. Whitley and Mr. Mangrum liars (EX 30; EX 69 at 14:1-15:1). Mr. Mangrum testified that these two jobs of light grinding and picking up nuts and bolts have been available since 1977 at the same pay scale with the same potential for wage increases as the job the Claimant had on the date of injury (EX 69 at 18:4-17).

Because the Claimant's supervisor of personnel, Mr. Freda, had left the Shipyard, the Employer called David W. Schnake, the supervisor of personnel at the time of the hearing, to testify based on the Claimant's employment records. Mr. Schnake testified that the Claimant was absent for more than five days without calling in or obtaining authorization. He further testified that pursuant to standard Shipyard procedures, the Claimant was terminated from the Shipyard employment rolls effective January 13, 1978 (EX 70 at 6:6-21; **See also** EX 3B).

Mr. Schnake testified that every employee of whom he was aware and who has ever been away from the Shipyard for five days with an unexcused absence, or without what the company considers an appropriate medical reason for being off work, had been terminated by the Shipyard (EX 70 at 14:8-23). The Claimant candidly admitted that the union delegate told her that she was discharged for not calling in every five days as is required by the union contract (EX 62 at 29:4-8, 30:1-9).

The pertinent medical evidence will now be summarized at this point. Dr. Harmon, who has been a practicing physician since 1962 and who began working at the Shipyard clinic in 1968, became assistant medical director in 1971 and was promoted to medical director in 1976 (EX 66 at 3:19-4:5).

Dr. Harmon examined the Claimant on one occasion. He also acted as custodian of her medical records and reviewed her

records periodically to determine her medical status and whether to authorize her work absences (EX 66 at 4:10-14).

Dr. Harmon wrote to Dr. Harrison on several occasions requesting current medical reports and an explanation for the Claimant's continued absence from work (EX 66 at 17:16-18:16). The only response Dr. Harmon received was Dr. Harrison's September 28, 1977 correspondence indicating that Dr. Harrison had referred the Claimant to a neurosurgeon (Dr. Rashti), whose examination was totally negative (EX 8A).

To determine whether the Claimant was disabled, Dr. Harmon scheduled appointments with Dr. Winfrey, a board-certified thoracic surgeon, on November 21, 1977 and again on November 28, 1977 (EX 66 at 17:3-15). The Claimant, by her own admission, failed to keep either appointment (EX 3C and EX 62 at 16:3-17:16). Consequently, the Shipyard terminated her workers' compensation benefits as of December 4, 1977 (EX 3C; EX 3F at 7; EX 7; EX 66 at 21:3-9).

Dr. Harmon, on the basis of his examination of the Claimant and his review of her medical records, testified that the Claimant physically was able to pick up washers and to operate a grinder with no problem (EX 66 at 24:20-27:5), that both jobs required very little effort and that even an invalid person could perform the job of picking up washers (EX 66 at 25:14-16).

Dr. Harmon further testified that based on his review of the x-ray taken by Dr. Stetson on February 1, 1978, which was read by Dr. Legg, a board-certified radiologist, as showing no fracture, the Claimant did not suffer a fractured sternum (EX 8E; EX 66 at 29:10-13; 46:18-47:2; 59:24-60:24). He further testified that even assuming the Claimant had suffered a fractured sternum as a result of her July 27, 1977 accident, she would have been asymptomatic enough or stable enough to pick up washers and to perform light grinding certainly by January 1978 (EX 66 at 27:16-28:8). Dr. Harmon explained that because the fracture occurred six months earlier, the two weeks of rest recommended by Dr. Verdirame were unnecessary (EX 66 at 28:9-29:9). He noted that most fractures heal within six to eight weeks, whether they are immobilized, and that a fractured sternum would have healed within six months. He also noted that her February 1, 1978 physical examination by Dr. Verdirame revealed no evidence of an unhealed sternum fracture (EX 66 at 29:3-9; 45:12-46:11). Dr. Harmon noted that he did not place the Claimant at maximum medical improvement as of January 18, 1978 because of her continuing complaints and because he did not have all of the Claimant's medical records at that time (EX 66 at 65:6-66:4).

Dr. Harmon testified that the Shipyard's record of the Claimant's injury on July 27, 1977 reflected a contusion of the anterior chest wall and a contusion of the right upper arm, but did not indicate any type of cut or opening of the skin, such as an abrasion or laceration. Dr. Harmon stated that the diagnosis of metallic foreign bodies embedded in the skin was an error and probably represented an artifact on an x-ray because the Claimant had no break in her skin and no abnormalities appeared on prior x-rays (EX 3F; EX 4; EX 66 at 8:2-10:10).

Dr. Harmon testified that based on his review of the complete records, including reports from all examining physicians, and based on the nature of the injuries reported by other workers in the Shipyard clinic, he did not believe the Claimant's complaints of pain to be credible (EX 66 at 30:13-23). Dr. Harmon concluded that the Claimant was malingering and he based this conclusion on the Claimant's hostility, her refusal to perform work within her restrictions, her refusal to cooperate, her refusal to undergo an independent medical examination and her exaggerated and subjective complaints, which were out of proportion to any positive findings (EX 66 at 50:10-51:6).

The clinic file indicates that the Claimant obtained medical treatment from her family doctor, Dr. A. B. Harrison (EX 3F at 5). On July 30, 1977, Dr. Harrison prescribed treatment for post-concussion headaches (EX 8A). On August 3, 1977, Dr. Harrison diagnosed a contusion and sprain of the right shoulder and right arm and a post-concussion headache (EX 3F at 11). He treated the Claimant with analgesics, muscle relaxants, sedatives, tranquilizers, and local heat applications (Tr. at 39:15-23). He also referred her for a neurological evaluation performed by Dr. Rashti, a test the doctor reported was normal (EX 8A).

On September 29, 1977, Dr. Harrison released the Claimant to return to work, but recommended that she avoid lifting, climbing, or ascending extreme heights due to dizziness (EX 3F at 12). He saw the Claimant again on October 22, October 29, November 22, and December 29, 1977 (EX 21). On December 29, 1977, Dr. Harrison issued a disability slip recommending that the Claimant avoid climbing, lifting, and straining due to residual soreness of the chest and shoulders (EX 3F at 10; E-58). Dr. Harrison did not indicate in his records that the Claimant had suffered a fractured sternum (EX 66 at 13:22-14:1; 15:3-10).

Dr. Rashti, a neurosurgeon who examined the Claimant on September 6, 1977, found a normal neurological examination and no organic evidence to link her headaches to her injury. Dr. Rashti stated: "I do not see any reason from a neurosurgical

standpoint, why this patient cannot resume her usual activities" (EX 8).

Dr. Joseph L. Verdirame, a specialist in internal medicine, and Dr. L. J. Stetson, a radiologist, of the Lakeview Clinic, evaluated the Claimant on February 1, 1978. They diagnosed a fracture of the sternum without displacement on the basis of an x-ray of the sternum taken February 1, 1978. Dr. Verdirame detected no permanent defect and noted that the Claimant should be able to return to her regular job after two weeks of rest to allow time for union of the fracture. His disability slip dated February 1, 1978 recommends no heavy lifting and bending at the legs, rather than the waist (CX 12; CX 20; CX 22; CX 22A; EX 8D; EX 9).

Dr. Pillai, at the Lakeview Clinic, also examined the Claimant and referred her to Dr. Grinnan. His disability slip, dated March 2, 1978, recommended that the Claimant refrain from lifting, pushing, pulling, or any other heavy labor (CX 13; CX 22A; EX 9).

Dr. Grinnan examined the Claimant on March 22, 1978. He noted that while the Claimant complained of extreme chest pain, "I was able to lay my hand against the chest at times when she was coughing and this did not result in any pain; however, when I pressed my hand directly on the sternum and questioned her about the discomfort she winced and grimaced as if there were significant discomfort to this maneuver. Normally, when the hand was resting against the sternum and not asking her if it hurt, she did not show any evidence of any significant discomfort. . . . Compression of the lateral portion of her chest did not cause any pain or discomfort." Dr. Grinnan, based on the history and physical examination, could not find any major problems related to Claimant's chest or sternum. He made a request to obtain the follow-up x-rays and to discuss this further with Dr. Pillai and he "told the patient that he did not see any major thoracic injury or problem and that she needed to make some disposition with her Employer about her work status." (EX 9A).

The Claimant's first attorney referred the Claimant to Dr. Stanley Z. Felsenburg (EX 62 at 39:16-40:3). Dr. Felsenburg examined the Claimant on September 20, 1978, and without any explanation and without taking any x-rays, rated the Claimant with a 25% permanent partial disability of the chest wall. He did not provide a basis for this rating, nor did he assign any work restrictions. He merely noted tenderness and subjective complaints of pain, but the examination was normal (EX 11). Because the Claimant was to be treated by an orthopedic specialist, Dr. Felsenburg discharged her from his care on

October 23, 1978 with a final diagnosis of a severe contusion of the chest wall (EX 13).

Dr. Allan H. Macht, who is board-certified in general surgery, examined the Claimant on November 1, 1978. He was unable to detect a fracture on the sternum x-ray and diagnosed post-contusion of the chest. He noted subjective complaints of pain, but did not recommend further treatment. Dr. Macht stated: "She is able to work at the present and should be encouraged to go back to work. She has a 15 percent permanent partial disability of her chest wall" (EX 14).

Dr. Macht re-evaluated the Claimant on August 20, 1983 at the request of her attorney (EX 62 at 40:8-14). He diagnosed post-contusion of the chest and recommended symptomatic and supportive conservative treatment (EX 46).

The Claimant was evaluated by Dr. David L. Filtzer on October 14, 1981 at Johns Hopkins Orthopedic Surgery. The Claimant did not obtain authorization from the Shipyard for this evaluation (EX 62 at 49:6-21). The Claimant complained to Dr. Filtzer that she had gone from doctor to doctor and that no one had done anything for her. Dr. Filtzer noted that the Claimant moved with ease, and her neurological examination was normal. He concluded: ". . . there is little if any organic cause for her persistent complaints. . . ." (EX 31). Dr. Filtzer noted that the Claimant's absence from work was due to a conversion compensation neurosis² (EX 26; EX 30; EX 31).

Dr. Filtzer re-evaluated the Claimant on March 14, 1982. He noted that the Claimant moved with ease and her neurological examination was negative. He also noted no evidence of osteochondritis (Tietze's syndrome). Dr. Filtzer stated: "I do not believe that the fractured sternum could be giving rise to these symptoms this long after the accident. Furthermore, her symptoms are so widespread that it is difficult to conceive how they could be organic in nature." (EX 34). Nevertheless, based solely on Claimant's subjective complaint. Dr. Filtzer hospitalized and tested the Claimant (EX 26; EX 34).

On March 20, 1982, following the Claimant's extensive work-up at Johns Hopkins Hospital, Dr. Filtzer thought the Claimant had minor post-traumatic chondritis of the right upper chest wall with tremendous accentuation of symptoms on a

²Dr. Siebert defined the term compensation neurosis used by Dr. Filtzer to mean "behaving in a certain way for financial gain so that they are exhibiting symptoms in order that some financial gain may result in the future." (EX 87 at 38:8-15). Dr. Siebert equated that term to malingering (*Id.* at 41:13-16).

psychogenic basis. He stated that the Claimant had reached maximum medical improvement and rated her with a 5 percent permanent partial disability of the whole body. Dr. Filtzer concluded that the Claimant ". . . could be working full time at present in any heavy work capacity whatsoever. . . ." (CX 26; EX 36).

On September 28, 1982, Dr. Filtzer reviewed the Claimant's x-rays of the sternum. He interpreted the February 1, 1978 x-ray as showing a fracture without displacement, which was healed by the time of the March 22, 1982 x-ray. Dr. Filtzer again opined, "[t]here is no question whatsoever in my mind but that she has a gross exaggeration of symptoms and responses to the examination on a psychogenic basis. It is still my opinion that she could be working full time at present in any type heavy work capacity whatsoever." (EX 37) (**See also** CX 17 at 2; EX 8E; EX 9).

Dr. Filtzer evaluated the Claimant on June 3, 1985 at Johns Hopkins Hospital. The Claimant had a full work-up by Dr. Filtzer and associated evaluations and testing. Tests performed, including an EMG, a CAT scan, and an x-ray of the right shoulder and right upper chest, were normal and ruled out the presence of any metal fragments in the Claimant. Dr. Filtzer performed a complete examination of the Claimant's neck, shoulders, arm, back and legs, and reviewed all of her medical records (EX 57 at 1-6).

Dr. Filtzer, who is an associate professor of orthopedic surgery and an assistant professor of neurological surgery at Johns Hopkins, and who has been board certified in orthopedic surgery for thirty (30) years, stated: "[I]t is my studied opinion that this woman does not have a brachial plexus involvement, does not have a foreign body in or about the region of the right brachial plexus, and that her symptoms are not due to any organic cause whatsoever." (EX 57 at 7). Dr. Filtzer expressed his opinion, after his comprehensive evaluation, that the Claimant had no disability whatsoever and could work, full-time, without any restrictions at least as of March 20, 1982, when he previously saw her and probably long before that date (EX 57 at 8).

Claimant's medical records reflect that she was examined at The Johns Hopkins Hospital Emergency Room on October 1, 1978 for complaints of chest pains and that she was diagnosed with musculoskeletal pain, but no acute problems were found (EX 12). The Claimant was also seen at Johns Hopkins Emergency Room on July 6, 1981 and was diagnosed with hypertension and musculoskeletal pain (EX 24; EX 25).

The Claimant was examined by Dr. Tulipen, at The Johns Hopkins Hospital, Adult Neurology Clinic, on August 19, 1981. Her cervical spine x-ray showed no fracture, subluxation or disc disease. Her neurologic examination was normal except for some tenderness (CX 26; EX 26). Dr. J. A. Winfield at The Johns Hopkins Hospital, Adult Neurology Clinic, evaluated the Claimant on September 16, 1981. Other than some tenderness, his examination was unremarkable. He prescribed Motrin and a TNS stimulator (CX 26; EX 29). Dr. Tulipen again examined the Claimant at the Adult Neurology Clinic on October 14, 1981 for complaints of right parasternal and right cervical pain. He did not recommend surgery and prescribed a 2-week course of Zomax as a last resort. Dr. Tulipen noted that there was little chance of relieving her pain and stated that if the Zomax did not provide relief, he had nothing further to offer her (CX 26).

From March 14, 1982 to March 17, 1982 the Claimant was admitted for extensive evaluation at Johns Hopkins. Dr. Stephen C. Achuff conducted a cardiac evaluation, Dr. Baker conducted a thoracic evaluation, and Dr. Moses conducted a neurological evaluation, all of which were negative. An EMG on March 15, 1982 was normal, as were a cervical and thoracic pantopaque pan myelogram. A cervical x-ray did not reveal any arthritis or subluxation. The Psychology Department noted that the Claimant may be ". . . very vulnerable to enhancing somatic symptoms whatever their organic basis. . . ." and noted that conservative treatment might be in her best interest (CX 26; EX 35; EX 36).

Dr. Bruce Moffett evaluated the Claimant at the Johns Hopkins Hospital, Neurosurgery Clinic, on May 25, 1983. Dr. Moffett advised the Claimant that "no abnormalities can be found, either on physical exam or on tests. . . ." He suggested mild pain relievers and hot towels as needed (CX 26; EX 45).

The Claimant underwent an examination by Orthopedic Associates of Virginia in March 1980. Both her physical examination and her EMG test were normal (CX 28; EX 73).

The Claimant was seen at the Peninsula Institute For Community Health between January 1, 1981 and April 12, 1982. On January 8, 1981, Dr. George Marks, Jr., stated that the Claimant could not work in jobs that require lifting, pushing, pulling, or any repetitive hand movement for 4 to 6 months. On May 6, 1981, Dr. Marks diagnosed probable rheumatoid arthritis and indicated that the Claimant could not work for six months. No x-rays were taken, and apparently the rheumatoid arthritis diagnosis was refuted by the Medical College of Virginia (hereinafter "MCV"). Dr. Michael Parson stated on a December 9, 1981 form his diagnosis of chronic chest pain and pain when lifting more than five pounds. He stated that the Claimant could not do any work and was permanently and totally disabled.

Dr. Parson left any further disability evaluation to MCV. Dr. Parson's last note, dated April 12, 1982, indicated that the Johns Hopkins workup was negative for organic causes for her chronic pain (EX 23; EX 27; EX 32).

The Claimant's testimony was internally inconsistent and repeatedly contradicted by reliable documentary evidence. As such, I find her testimony to be unreliable, and thus give it little, if any, weight, as further discussed below.

The Claimant testified at the hearing to a work history which was inconsistent with the work history on her Shipyard employment application and in her interrogatory answers. The Claimant alleged that she worked at jobs and for time periods which were not listed on her employment application or in her interrogatory answers (Tr. at 29:11-33:11; EX 3B at 7; EX 64 at 8-9). Similarly, contrary to the Claimant's testimony, the evidence shows that she was not working for a substantial time period due to her car accident and that she actually was not working when she was hired at the Shipyard (EX 63; EX 67).

The Claimant's actions also contradicted her own testimony. The Claimant testified that Dr. Harrison released her to return to work on January 2, 1978, because she thought she would lose her job if she did not return to work (Tr. at 40:23-41:13). She testified that she tried to perform the light grinding job and the job picking up washers, but that it felt like her chest was opening and closing. She stated that all of that work made her hurt so badly that her whole head would start to hurt (Tr. at 46:23-47:6). The Claimant stated that when she complained about the pain, the Shipyard passed her out (Tr. at 41:21-43:8). She also testified that she was terminated from the Shipyard as of January 27, 1978 (Tr. at 44:10-45:11). (As noted above, the actual date was January 13, 1978.)

Despite this alleged pain and injustice, the Claimant failed to pursue her claim and did not actively seek medical care from 1978 to 1980. The Claimant admitted that she failed to keep her appointments with Dr. Winfrey scheduled by the Shipyard, yet she continued to complain that she was hurting (Tr. at 63:15-64:9). Only when her marriage began to break up in 1980 did the Claimant begin to pursue her claim and seek medical treatment (Tr. at 58:11-59:7).

The Claimant's testimony concerning her efforts to try to find work was equally unbelievable and incredible. The Claimant denied that she ever refused to undergo job interviews or to complete job applications unless she was guaranteed employment, contrary to Mr. Rose's testimony (Tr. at 59:8-17; **See also** EX 62 at 41:20-42:5). She testified that she tried to find work when she returned to Baltimore (Tr. at 48:10-16). The evidence

shows, however, that she refused to cooperate with job placement (Tr. at 129:12-130:5; EX 21). The Claimant testified that she obtained a job on her own at Perma Lightbulb, but she continued to experience pain. She got in an argument with her employer and was also terminated there. (Tr. at 49:4-14). She further testified that she has not felt capable of performing full-time work (Tr. at 54:1-8).

The Claimant testified at the hearing that she continued to experience pain in the right side of her neck, her chest, her right arm, and her head. She noted that she continued to be examined by doctors and that some of them prescribed medication (Tr. at 48:20-49:3). The Claimant testified that simple activities such as riding a bus, chewing food, and writing cause her pain, yet she is able to drive herself to visit friends and relatives (Tr. at 52:22-53:8; 54:20-55:24). Given the Claimant's inaccuracies in her other testimony and her normal medical examinations, I cannot credit her exaggerated and subjective complaints of pain, as further discussed below.

The Claimant testified that Dr. Kan and Dr. Tyson tried to remove the metal from her shoulder (Tr. at 60:1-12). Dr. Tyson, however, testified that he made no such attempt and Dr. Kan's records do not substantiate that he made any such effort (Tr. at 120:17-121:19; EX 76). Dr. Siebert noted that the Claimant gave inconsistent and incomplete histories to her physicians and exaggerated her complaints. My review of the evidence verifies these repeated material and substantial inconsistencies between the Claimant's testimony and this closed record, as further discussed below. As noted above, the Board's mandate to this Administrative Law Judge is to determine:

(1) Whether Claimant has established disability due to her alleged work-related injury before March 20, 1982?

(2) Whether Claimant is entitled to an award of medical benefits under Section 7 of the Act.

On the basis of the totality of this closed record, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), reh. denied, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164,

165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. See 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, supra, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), rev'g **Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), rev'g **Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, i.e., harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm

or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita, supra; Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier, supra; Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit, held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id.**, 109 F.3d at 56, 31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette**, 109 F.3d at 56, 31 BRBS at 21 (CRT). The totally "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh

Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See, e.g., Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See, e.g., Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that she experienced a work-related harm, and as it is undisputed that a work accident occurred on July 27, 1977 which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See, e.g., Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the

employer must offer evidence which negates connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which negates or severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied**, 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to Employer to rebut the presumption with substantial evidence which establishes that Claimant's employment did not cause, contribute to, or aggravate her condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied**, 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The forthright testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If the Employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to her bodily frame, **i.e.**, her chest, shoulder and lumbar problems, resulted from her July 27, 1977 accident at the Employer's shipyard. However, the Employer has introduced substantial evidence severing the connection between such harm and Claimant's maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the record evidence.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See 33 U.S.C. §902(2); U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11

BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

On the basis of the totality of this closed record, I find and conclude that Claimant sustained a work-related injury on July 27, 1977 in a relatively minor shipyard lifting accident, that she was treated conservatively for several months, that she was released to return to work with certain restrictions, that the Employer made available to her adjusted work within her restrictions, that Claimant did not make a good faith effort to see if she could perform those extremely light duty jobs at the same pay rate as her pre-injury wages, that Claimant failed to keep two medical appointments scheduled for her by the Employer and that finally the Employer, for just cause, terminated Claimant on January 13, 1978 because she was absent from work for five (5) consecutive days without permission from the Employer and without a medical slip authorizing such absence. These findings will be further discussed below.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397

F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movable Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Moreover, although a claimant relocates for personal reasons, employer can still meet its burden of establishing suitable alternate employment if it shows that such jobs are available within the geographical area in which claimant resided at the time of the injury. **McCullough v. Marathon LeTourneau Company**, 22 BRBS 359, 366 (1989); **Dixon v. John J. McMullen and Associates**, 19 BRBS 243 (1986); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984).

The Claimant contends that she is entitled to temporary total or permanent total disability benefits after December 4, 1977, which is the date the Employer suspended compensation based on her failure to undergo an independent evaluation by a

thoracic surgeon and her failure to return to work. The Employer asserts that the Claimant is not entitled to any further compensation benefits. Based on my review of the evidence, taken as a whole, I find that the Claimant was able to return to her regular job by at least December 4, 1977. Therefore, I find that she is not entitled to temporary total or permanent total disability benefits for the following reasons.

Based on the records of Drs. Rashti and Harrison, I find that the Claimant reached maximum medical improvement from her chest injury by December 4, 1977. Both Dr. Harrison and Dr. Rashti had released the Claimant to return to work by this time.³ I recognize that Dr. Harmon advised the then Deputy Commissioner that as of January 18, 1978 he had not yet placed the Claimant at maximum medical improvement. He explained, however, that this was based on the Claimant's continuing subjective complaints and his lack of the Claimant's complete medical records (EX 66 at 65:6-66:4). I find that the Claimant's subjective complaints were not substantiated by any objective findings and were not credible and that her condition had in fact resolved by December 4, 1977. Thus, as I find the Claimant is not entitled to temporary disability benefits after that date, the Employer properly terminated her benefits. **See Phillips v. Marine Concrete Structures**, 21 B.R.B.S. 233 (1988).

Based on my review of the evidence, I find that the Claimant did not sustain a permanent physical impairment or disability as a result of her July 27, 1977 injury. I credit the opinion of Dr. Rashti, a neurosurgeon, who examined the Claimant less than two months after her injury and found no organic neurological problem. He opined, forthrightly and without equivocation, that the Claimant was able to resume her usual activities as early as September 6, 1977 (EX 8). I also credit, in part, the opinion of Dr. Harrison, a family practitioner, who examined and treated the Claimant immediately after her injury. Although he is not a specialist, he followed the Claimant for five months after her

³Dr. Rashti found nothing wrong with the Claimant as early as September 6, 1977 (EX 8). Dr. Harrison initially released the Claimant to return to work with restrictions on September 29, 1977. His records indicate that he examined the Claimant on October 22, October 29, November 29, and December 29, 1977, at which time he again released her to return to work with restrictions on January 2, 1978 (EX 3F at 10). Dr. Harrison's records do not indicate that the Claimant was disabled from any and all employment during this time. They merely show that he was relying on the Claimant's subjective complaints, rather than on any objective findings, in continuing to treat her (CX 21). Thus, I find that Dr. Harrison's reports do not provide a basis for a continuing disability after December 4, 1977.

injury. I credit his opinion to the extent that he originally released the Claimant to return to work with restrictions on September 29, 1977 (CX 21; EX 8A). I do not find that his subsequent reports support additional disability benefits, because he relied merely on the Claimant's exaggerated and subjective complaints which have already found by this Administrative Law Judge to be not credible and exaggerated.

I do not credit the opinion of Dr. Verdirame, who specializes in internal medicine, that the Claimant sustained a non-displaced fracture of the sternum as a result of her July 27, 1977 injury, for which she required two weeks of rest. Dr. Verdirame did not examine the Claimant until more than six months after her injury, and he relied on x-rays taken more than six months after her injury (CX 12; CX 20; CX 22; EX 8D; EX 9). The physicians who examined the Claimant earlier and viewed earlier x-rays were in a better position to evaluate the Claimant.

Furthermore, I credit the opinion of Dr. Harmon, who specializes in occupational medicine. He reviewed all of the Claimant's medical records and x-rays and opined that the Claimant did not fracture her sternum as a result of her July 27, 1977 injury (EX 8E; EX 77 at 29:10-13; 46:18-47:2; 59:24-60:24). Dr. Harmon opined that the Claimant did not sustain a permanent impairment and did not necessitate permanent work restrictions. Based on his thorough review of the medical records and his examination of the Claimant shortly after her injury, I credit Dr. Harmon's opinion, which is well-reasoned, well-documented and based on his review of all Claimant's medical records.

I credit the opinion of Dr. Grinnan, who specializes in internal medicine and pulmonary disease. Although he did not review x-rays of the Claimant, he obtained a complete history of her injury and medical treatment and conducted a thorough examination. Dr. Grinnan's report indicates that the Claimant was referred for further evaluation for a possible fractured sternum. He noted her subjective and inconsistent complaints and opined that she had no major problems. Dr. Grinnan did not assign a permanent impairment rating or work restrictions, nor did he recommend any medical treatment (EX 9A).

I do not credit the opinion of Dr. Felsenburg, who is not a specialist. Although he assigned a 25 percent permanent impairment rating to the Claimant's chest wall, he did not review the Claimant's x-rays and did not provide any explanation or basis for his impairment rating (EX 11; EX 13). Thus, I do not find his opinion to be well-reasoned or well-documented.

I credit the opinion of Dr. Macht, who is board-certified in general surgery, but only to the extent that he found the Claimant able to work. I do not credit his opinion that the Claimant sustained a 15 percent impairment to the chest wall, because he based it on the Claimant's subjective pain and discomfort rather than on any objective findings (EX 14; EX 46).

I credit much of the opinion of Dr. Filtzer, who has been board-certified in orthopedic surgery for over 30 years and who is an associate professor of orthopedic surgery and assistant professor of neurological surgery at Johns Hopkins. Dr. Filtzer reviewed the Claimant's medical records and conducted a complete work-up at The Johns Hopkins Hospital, the results of which were normal. Although he assigned a 5 percent permanent partial disability rating to the body as a whole, he opined that the Claimant could be working full-time in any heavy work capacity whatsoever (CX 26; EX 30; EX 31; EX 34; EX 36; EX 37; EX 57).

Based on the evidence, taken as a whole, I find that the Claimant sustained no disability as a result of her July 27, 1977 injury after December 4, 1977. Based on the various diagnoses for the Claimant, it is obvious that several doctors were misled by the Claimant's exaggerated complaints and inaccurate history. All objective tests, such as EMGs and CAT scans, were read as normal. When physicians such as Dr. Rashti, Dr. Grinnan, Dr. Filtzer, Dr. Moffett, and Dr. Kan had a complete history and made a full examination, they all found no organic basis for the Claimant's complaints of pain. Most of the doctors who found some type of problem, based their opinions on the Claimant's exaggerated and subjective complaints rather than on any objective findings, and I so find and conclude.

Because the Claimant is able to work and has sustained no permanent physical impairment as a result of her July 27, 1977 injury, I find that she is not entitled to temporary total or permanent total disability benefits. Even assuming, **arguendo**, that the Claimant required permanent work restrictions, the Employer has presented ample evidence of jobs available within her restrictions at the Shipyard at no loss in pay. Moreover, the fact that the Claimant did not avail herself of these job opportunities and subsequently was released from the employment rolls for failing to comply with the five-day call-in rule, does not entitle the Claimant to an award of disability benefits as she has voluntarily removed herself from the job market for her own personal reasons. **Brooks v. Newport News Shipbuilding**, 2 F.3d 64 (4th Cir. 1993).

Furthermore, I find and conclude find that the Claimant was not disabled for the two-week period in February 1978, when Dr. Verdirame suggested two weeks of rest. The evidence is conflicting as to whether the Claimant sustained a non-displaced

fracture of the sternum. A chest x-ray taken on July 28, 1977, one day after the injury, was read as negative by Dr. Padayhag, a Shipyard physician (EX 66 at 42:4-7). Similarly, a chest x-ray taken on October 24, 1977, three months after the injury, was read as negative by Dr. Harmon, the Shipyard's medical director (EX 66 at 42:8-11).

A chest x-ray taken on February 1, 1978, more than six months after the injury, originally was read as showing no fracture or other abnormality by Dr. Verdirame, who specializes in internal medicine (EX 8D). Dr. Stetson, a radiologist, however, read the February 1, 1978 chest x-ray as showing a non-displaced fracture of the sternum, with which Dr. Verdirame then concurred (CX 20; EX 9). Dr. Filtzer, an orthopedic surgeon, also read the February 1, 1978 chest x-ray as showing a non-displaced fracture of the sternum. Dr. Filtzer also reviewed a March 22, 1982 chest x-ray, which showed no evidence of a fracture, and concluded that the fracture healed uneventfully with no residual x-ray stigmata (CX 17 at 2).

Dr. Harmon, the Shipyard's medical director, reviewed the February 1, 1978 chest x-ray and opined that the Claimant did not suffer a fractured sternum (EX 66 at 46:18-47:2; 59:24-60:24). Dr. Quentin J. Legg, a board-certified radiologist, also reviewed the February 1, 1978 chest x-ray and found no evidence of a fracture of the sternum or other bony abnormality (EX 8E; EX 66 at 29:10-13). Dr. Macht, a board-certified general surgeon, also reviewed the Claimant's chest x-ray and was unable to detect a fracture of the sternum (EX 14).

Because the Claimant refused to submit to a medical examination by Dr. Winfrey, a thoracic surgeon, at the Employer's request, Dr. Winfrey was unable to review the x-rays and to provide the Employer with his opinion on whether the Claimant sustained a sternum fracture. Unfortunately, the February 1, 1978 x-ray in question has been lost or destroyed, so the independent examiner, Dr. Kan, was also unable to interpret the film.

As the x-ray evidence is in conflict, I credit the well-reasoned and well-documented opinions of Dr. Legg, who is a board-certified radiologist, and Dr. Harmon and Dr. Padayhag, who specialize in occupational medicine, that the Claimant did not sustain a fractured sternum as a result of her July 27, 1977 injury. I give weight to the fact that contemporaneous chest x-rays previously taken on July 28, 1977 and October 24, 1977 revealed no evidence of a fractured sternum. If a fracture had occurred at the time of her injury, evidence of the fracture should have appeared on these earlier x-rays of the Claimant's

sternum reviewed by these qualified physicians, and I so find and conclude.

Even assuming, **arguendo**, the Claimant had sustained a non-displaced fracture, it certainly had healed by at least January of 1978 (EX 66 at 26:16-28:8). Dr. Harmon noted that most fractures heal within six to eight weeks; whereas the Claimant was out of work and was paid compensation for over four months (EX 1; EX 66 at 45:12-20). In addition, Dr. Filtzer, who thought the chest x-ray showed a non-displaced fracture, stated that the x-ray "does not change my opinion in any way whatsoever. There is no question whatsoever in my mind but that [Ms. Cotton] has a gross exaggeration of symptoms and could be working full time at present in any type heavy work capacity whatsoever" (CX 17 at 2). Although Dr. Filtzer first saw the Claimant a few years after her injury, his statement is consistent with Dr. Harmon's view that a non-displaced fracture does not cause a long-term disability.

Although Dr. Verdirame recommended that the Claimant not return to her position at the Shipyard or perform any housework for approximately two weeks, I credit the testimony of Dr. Harmon that the Shipyard had extremely light and sedentary positions of light grinding and picking up nuts and bolts available to the Claimant, which were within her capabilities even for those two weeks. I find that these positions, as described by Mr. Whitley and Mr. Mangrum, constitute extremely light work requiring less effort than that required to perform housework. I also note that even Dr. Verdirame did not prohibit the Claimant from returning to her usual employment after the two weeks of recommended rest. I do not see how the Claimant could need to go from bed rest to regular work. The logical inference is that she could perform at least the sedentary positions of available work for the two weeks, especially since all this took place 6 months after the injury, and I so find and conclude.

I credit Dr. Harmon's opinion regarding the Claimant's ability to work based on his familiarity with Shipyard work in general and those two jobs in particular, as well as his ten years of experience in occupational medicine (EX 66 at 25:5-27; 34:11-15). Dr. Harmon explained logically why the Claimant could perform these jobs; whereas Dr. Verdirame offered no explanation for his bar of any work for two weeks during February. Given the length of time since the injury, Dr. Verdirame's opinion cannot be accepted, without an explanation, over Dr. Harmon's well-reasoned testimony. I also credit the testimony of Mr. Whitley and Mr. Mangrum that the Claimant did not make a good faith effort to perform these light duty jobs, a fact which further supports Dr. Harmon's testimony.

Accordingly, in view of the foregoing, I find and conclude that Claimant had recovered from her relatively minor injury on July 27, 1977 certainly by at least December 4, 1977, that after that date Claimant, if properly motivated, could have performed the light duty jobs the Employer offered her, that the Employer properly terminated Claimant, effective January 13, 1978, as she was absent from work for more than five (5) days without calling into her Employer or without obtaining authorization from the Employer and that she has not sustained any disability between December 5, 1977 and March 20, 1982.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such

treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). See also 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal, supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

The Employer has moved for imposition of the sanctions of Section 7(d)(4). This section of the Act authorizes this Administrative Law Judge to suspend compensation during the time that an employee unreasonably refuses to undergo surgical or other medical treatment:

If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

33 U.S.C. § 907(d)(4). In **Maryland Shipbuilding and Dry Dock Co. v. Jenkins**, 594 F.2d 404, 10 BRBS 1 (CRT) (4th Cir. 1979), the United States Court of Appeals for the Fourth Circuit held that Section 7(d) sanctions can be applied regardless of whether

the Claimant is receiving compensation at the time. 594 F.2d at 406-07. Although **Jenkins** involved the denial of medical benefits, the Fourth Circuit emphasized that the sanctions in Section 7 clearly apply to all forms of compensation. 594 F.2d at 407. **Accord Adams v. Brookfield & Baylor Const.**, 5 BRBS 512 at 515-16 (1977); **Pettis v. American Airlines, Inc.**, 6 BRBS 461 (1977), **rev'd on other grounds**, 587 F.2d 627, 8 BRBS 800 (4th Cir. 1978).

The Claimant alleges entitlement to compensation after December 4, 1977, the date the Shipyard suspended compensation. Even assuming, **arguendo**, the Claimant was temporarily and totally disabled after December 4, 1977, which I do not find, I find that her refusal to undergo an evaluation by Dr. Winfrey was unreasonable, and thus under Section 7 of the Act, she is barred from recovering additional compensation. The Claimant continued to complain of problems, yet refused to be examined by a board-certified thoracic surgeon. The Claimant admitted that she did not submit to an evaluation by Dr. Winfrey and failed to present evidence that justified her refusal to be examined, and I find her refusal to be unreasonable because she denied the Employer the opportunity to update its medical evidence.

The record indicates that the Claimant missed her first scheduled appointment with Dr. Winfrey because her car broke down. The Shipyard, however, offered to provide transportation from the Shipyard to the doctor's office. However, she refused that reasonable offer. The Claimant testified that she had no way to get to her second scheduled appointment with Dr. Winfrey and that she saw no reason even to try to attend the appointment. She testified that she assumed Dr. Winfrey would say nothing was wrong with her, which would result in another argument with the clinic. The Claimant did not call Dr. Winfrey's office or the Shipyard clinic to explain why she failed to attend her second scheduled appointment (Tr. at 63:15-64:9; EX 3C; EX 7).

Pursuant to Section 7(d)(4) of the Act, I find that the Claimant's compensation should be suspended during the time that she unreasonably refused to submit to an examination by a physician selected by the Employer. I find that the Claimant's refusal to see Dr. Winfrey bars her entitlement to compensation from November 21, 1977 and continuing during the period she unreasonably refused to submit to an examination by a physician selected by the Employer. I further find that the Claimant's unreasonable refusal to submit to an examination was not cured until she underwent an independent medical evaluation by Dr. Siebert on November 8, 1985 (EX 75). Thus, I find that the Claimant's entitlement to compensation is barred from November 21, 1977 to November 8, 1985.

The Claimant contends that she is entitled to reimbursement for past expenses, as well as future medical treatment, for her alleged physical and psychiatric disabilities. The Employer asserts that it has provided all reasonable and necessary medical treatment.

The Claimant submitted various outstanding medical bills, but this closed record leads me to conclude that Claimant did not request that the Shipyard authorized any of these physicians to examine or to treat the Claimant (CX 5A to 5M; CX 24; CX 27). The Claimant also did not submit any evidence that these physicians filed attending physician reports on the form prescribed by the Deputy Commissioner. Thus, payment cannot be provided under Section 7 of the Act. 33 U.S.C. § 907; **Mattox v. Sun Shipbuilding & Dry Dock Co.**, 15 B.R.B.S. 162 (1983); **Maryland Shipbuilding & Dry Dock Co. v. Jenkins**, 10 BRBS 1, 594 F.2d 404 (4th Cir. 1979); **Jackson v. Ingalls Shipbuilding Div.**, 15 BRBS 299 (1983); **Betz v. Arthur Snowden Co.**, 14 BRBS 805 (1982).

The Claimant also failed to submit evidence that she actually paid these bills. In addition, the Claimant's counsel specifically stated at the hearing: "Frankly, I'm not concerned about the medical bills. There are a couple that I would be mainly concerned about, but most of them have been paid by Social Services." (Tr. at 64:23-65:3).

Pursuant to Section 7 of the Act, the Employer is required to furnish medical treatment "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907. A claimant is entitled to medical benefits for a work-related injury, even if the injury is not economically disabling. **Romeike v. Kaiser Shipyards**, 22 B.R.B.S. 57, 60 (1989). I find, however, that the Claimant's physical and psychiatric condition did not necessitate medical treatment in excess of that provided by the Employer.

The medical evidence taken as a whole leads to the conclusion that the Claimant's physical condition was stable by December 4, 1977 and on January 2, 1978 she attempted to return to work at the Shipyard. Although she continued to complain of pain, she had no objective physical findings to support her subjective complaints.

I credit the well-reasoned and well-documented opinions of Dr. Harrison, who found no need for further treatment and discharged the Claimant from his care on December 29, 1977, and Dr. Rashti, who found no neurological problems as early as September 6, 1977 (EX 3F at 10; EX 8; EX 58). Likewise, I also

credit Dr. Kan's opinion that any further treatment for the Claimant would be of no value (EX 76). He based this opinion on his examination of the Claimant, his interview with the Claimant, and his detailed review of the Claimant's medical records.

Although several doctors who examined or treated the Claimant recommended pain medication or heat applications, again **solely** based on her subjective complaints, I credit the opinions of all of the other doctors, whose well-reasoned and well-documented reports have been extensively summarized above, who found that the Claimant did not require medical treatment. Several doctors made no mention of treatment, and for the most part found nothing wrong with the Claimant. I infer from this that no treatment was necessary, because they found no organic problems requiring treatment.

The medical evidence taken as a whole also leads to the conclusion that the Claimant needed no further psychiatric care by March 15, 1982, when Dr. Ascher assigned a permanent impairment rating. Although Dr. Ascher recommended supportive psychotherapy, he stated that the Claimant had little insight and that he did not think the Claimant would accept such treatment (EX 35). I credit the opinion of Dr. Siebert, the independent evaluating physician, who did not specifically recommend psychiatric treatment, and who specifically stated that the Claimant should not even be taking Tylenol #3 for chronic pain (EX 75; EX 87 at 48:10-18). Dr. Siebert also noted that getting the Claimant back to work would be good for her (**Id.** at 84:9-15).

Even assuming, **arguendo**, that the Claimant did require some additional medical treatment, which the evidence does not support, the claim for medical benefits must be denied. Pursuant to Section 7(d)(2) of the Act, a claim for medical treatment is valid and enforceable against an employer only if the physician furnishes an attending physician's report to the employer and the then Deputy Commissioner within ten days of the first treatment. 33 U.S.C. § 907(d)(2). The Claimant presented no evidence to show that any of these doctors complied with Section 7(d)(2) of the Act. In addition, the Claimant presented no evidence to show that the interests of justice would be served by excusing the doctors' failure to file the required reports.

The Claimant contends that she was entitled to change physicians, because Dr. Harrison is a general practitioner and her condition required a specialist. Although the Claimant may change her free choice treating physician, under Section 7(c)(2) of the Act, the Claimant is required to obtain the prior consent of the employer or the Deputy Commissioner. The Act states that

such consent "shall be given" when the Claimant's initial choice was not a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable disease or injury. 33 U.S.C. § 907(c)(2). I find, however, that the Claimant's physical condition required no further treatment after January 2, 1978, the date she returned to work at the Shipyard. I also find that the Employer provided all necessary psychiatric treatment by authorizing the evaluation by Dr. Siebert.

Based on the evidence taken as a whole, I find that the Employer provided such medical treatment as the nature of the Claimant's injury and the process of her recovery required. Because the Claimant's alleged physical and psychiatric conditions did not require additional treatment, I find that the Employer is not responsible for past or future medical care. Thus, the Claimant's claim for medical benefits is denied.

ENTITLEMENT

Since Claimant has been fully compensated for her relatively minor July 27, 1977 injury, she is not entitled to additional benefits in this proceeding and her claim for benefits is hereby **DENIED**. Since any disability Claimant now experiences is due to other factors, none of which is work-related, severing the chain of causality or connection between such disability and her previous work-related injury, she is not entitled to benefits in this proceeding and her claim for benefits is hereby **DENIED**.

The rule that all doubts must be resolved in Claimant's favor does not require that this Administrative Law Judge always find for Claimant when there is a dispute or conflict in the testimony. It merely means that, if doubt about the proper resolution of conflicts remains in the Administrative Law Judge's mind, these doubts should be resolved in Claimant's favor. **Hodgson v. Kaiser Steel Corporation**, 11 BRBS 421 (1979). Furthermore, the mere existence of conflicting evidence does not, **ipso facto**, entitle a Claimant to a finding in his favor. **Lobin v. Early-Massman**, 11 BRBS 359 (1979).

While claimant correctly asserts that all doubtful fact questions are to be resolved in favor of the injured employee, the mere presence of conflicting evidence does not require a conclusion that there are doubts which must be resolved in claimant's favor. **See Hislop v. Marine Terminals Corp.**, 14 BRBS 927 (1982). Rather, before applying the "true doubt" rule, the Benefits Review Board has held that this Administrative Law Judge should attempt to evaluate the conflicting evidence. **See Betz v. Arthur Snowden Co.**, 14 BRBS 805 (1981). Moreover, the U.S. Supreme Court has abolished the "true doubt" rule in **Maher Terminals, Inc. v. Director**, OWCP,

512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994), aff'g 992 F.2d 1277, 27 BRBS 1 (CRT)(3d Cir. 1993).

ORDER

It is therefore **ORDERED** that the claim for compensation benefits filed by Adeline Torain Cotton shall be, and the same is hereby **DENIED**.

DAVID W. DI NARDI
Administrative Law Judge

Dated: January 2, 2001
Boston, Massachusetts
DWD:dr